No. 56758-0-II

COURT OF APPEALS
DIVISION II STATE OF WASHINGTON

TOKELAND GROWING, LLC, a Washington Limited Liability Company, and ALL SUB-TENANTS and VICKI A. LARSON,

Appellants,

v.

SUNGROWN FARMS, LLC, a Washington State Limited Liability Company,

Respondent.

APPELLANTS' REPLY BRIEF

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Tokeland entered a Lease with Sungrown that included a covenant of quiet enjoyment. Sungrown expressly promised Tokeland would, "peacefully and quietly have, hold, and enjoy the Premises…" The Trial Court's grant of summary judgment to Sungrown was improper—because, even on the scant record created by Tokeland's prior counsel, there were issues of material fact that should be left to a jury. For example, what were Sungrown's actions or inactions related to Tokeland losing power at the Premises, and whether such conduct violated the covenant of quiet enjoyment.

Additionally, Tokeland's previous counsel, David B. Gates Law, Inc., P.S., and attorneys David Gates and Matthew Ley (collectively, "Gates Law"), failed to diligently represent Tokeland. Gates Law failed to respond or object to the Discovery Requests, and the lack of discovery Gates Law performed led to an incomplete record. Essentially, Gates Law failed to be a zealous advocate and failed to provide adequate legal services.

The Trial Court erred in refusing to reconsider its summary judgment decision based Gates Law's misconduct. Summary judgement in this case is akin to a default judgment since Tokeland's prior counsel failed to do their job. Default judgments are routinely vacated once a party finds capable counsel to appear and effectively litigate the case. The policy for vacating default judgments is that every litigant deserves their day in Court to have their case heard on its merits. Tokeland has been denied its day in Court to this point.

I. ARGUMENT

A. Sungrown breached the covenant of quiet enjoyment.

A landlord's conduct that leads to damaging a tenant's goods has been held to be an interference with the tenant's enjoyment, which subjects the landlord to damages for breach of the covenant of quiet enjoyment. *See, e.g., Bancroft v. Godwin*, 41 Wn. 253, 83 P. 189 (1905). Further, "a breach of the covenant of quiet enjoyment will be established by evidence

that the lessor unreasonably interfered with the lessee's ability to conduct normal business operations on the premises." Richard J. Link, *Cause of Action for Breach of Covenant of Quiet Enjoyment of Leased Premises*, 29 Causes of Action 2d 511 (Originally published in 2005; July 2022 Update) (citing *American Dairy Queen Corp. v. Brown-Port Co.*, 621 F.2d 255 (7th Cir. 1980)).

Failure to provide services has been determined a breach of the covenant of quiet enjoyment:

> The failure of a lessor to provide a lessee with services necessary to the lessee's use of the leased premises may cause substantial interference and result in a breach of the covenant of quiet enjoyment. *Marchese v. Standard Realty & Dev. Co.*, 74 Cal. App. 3d 142, 141 Cal. Rptr. 370 (1st Dist. 1977) (grower of fruits and vegetables established breach of covenant by evidence of interference with water supply to property, which affected size of fruit and vegetable crop); *Dyecraftsmen, Inc. v. Feinberg*, 359 Mass. 485, 269 N.E.2d 693 (1971) (lessee of premises operated as commercial dyeing business, which required large quantities of processed steam, established breach of covenant on basis of refusal of lessors to supply steam). A lessee also may show a substantial interference by evidence that

> the lessor overcharged for utilities. *Legg v. Castruccio,* 100 Md. App. 748, 642 A.2d 906 (1994) (landlord breached covenant of quiet enjoyment by burdening one tenant with liability for other tenants' utility usage, as liable tenant had no prior knowledge of that burden and did not consent to it).

Richard J. Link, *Cause of Action for Breach of Covenant of Quiet Enjoyment of Leased Premises*, 29 Causes of Action 2d 511 (Originally published in 2005; July 2022 Update).

Even events occurring outside the Premises may breach the covenant of quiet enjoyment if the events impact the Premises and involve the landlord:

> Events or conditions occurring off the leased premises proper but having a direct effect on the premises may substantially interfere with the lessee's beneficial use and enjoyment of the premises, thereby breaching the covenant of quiet enjoyment. *Western Stock Center, Inc. v. Sevit, Inc.*, 195 Colo. 372, 578 P.2d 1045 (1978) (holding modified by, *Huddleston by Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282 (Colo. 1992)) (breach of covenant could be shown by evidence that lessor was negligent in selecting contractor whose employees started fire which resulted in condemnation of building and termination of lease by plaintiff of premises located in part of building); *Isbill Associates, Inc.*

> *v. City and County of Denver*, 666 P.2d 1117 (Colo. Ct. App. 1983) (engineering firm which leased office space raised jury question whether covenant of quiet enjoyment had been breached by water leak in ceiling, which was caused by work done by employee of lessor on pipes in basement of premises); *McCrory Corp. v. Latter*, 331 So. 2d 577 (La. Ct. App. 1st Cir. 1976), *writ denied*, 334 So. 2d 229 (La. 1976) (lessee established breach by evidence that pipe in basement of adjacent property owned by lessor broke, causing water to flow into leased premises); *Jablonski v. Clemons*, 60 Mass. App. Ct., 473, 803 N.E.2d 730 (2004) (moisture and foul odor problems originating in other apartment units); *Doe v. New Bedford Housing Authority*, 417 Mass. 273, 630 N.E.2d 248 (1994) (if plaintiffs were unable use common areas of development, including sidewalks, streets, parking lots, and recreation areas within it, then the situation constituted a serious interference with their quiet enjoyment and substantially impaired the character of the leased premises).

Richard J. Link, *Cause of Action for Breach of Covenant of Quiet Enjoyment of Leased Premises*, 29 Causes of Action 2d 511 (Originally published in 2005; July 2022 Update).

In the present matter, there is no express reference in the appliable Lease that requires the landlord to provide and/or ensure utilities at a certain level. However, there is an express

covenant of quiet enjoyment. And there is evidence in this case upon which a reasonable jury could determine the parties to the applicable Lease intended for quiet enjoyment in this case to include certain services/utilities.

There were and still are genuine issues of material fact to Tokeland's claims. Tokeland's claims were or negligent misrepresentation, breach of contract, and breach of quiet enjoyment. Each of these claims rest on similar facts, and there are genuine issues of material fact relevant to each of Tokeland's claims.

As pointed out, Tokeland and Respondent/Plaintiff, Sungrown Farms, LLC, ("Sungrown") negotiated a Letter of Intent ("LOI") concerning the two parties entering into a lease agreement with certain terms and conditions. CP 56. It is clear that Sungrown was aware of Tokeland's marijuana business and the operational needs of said business. CP 96. Tokeland and Sungrown entered into an Industrial Lease Agreement, dated May 15, 2019 (the "Lease"). CP 7. Per the Lease,

Sungrown was to provide certain amenities which included fencing the leased premises and installing security cameras. CP 10. The Lease only provided the commencement date was when Tokeland received approval from the Washington State Liquor and Cannabis Board ("WLCB"). CP 7

Due to the fact that the fencing and cameras were not timely set up on the leased premises, Tokeland experienced delays in moving its grow operation onto the property. CP 94. Due to the delay, Tokeland moved onto the property on or about July 3, 2019. CP 69; CP 94. The problems with the leased premises were never ending. Tokeland and Sungrown had numerous issues over the nearly two-year span Tokeland leased the premises.

Genuine material issues existed as to the move-in date for the property as the Lease only provided the commencement date was when Tokeland received approval from the WLCB. The move-in date was negotiated to allow for 30 days for Tokeland to move equipment to the leased premises. Although

this may seem unambiguous, it is not. Sungrown admits it knew Tokeland needed WLCB approval prior to moving in. In order to receive such approval from WLCB, Tokeland needed the infrastructure in place to support its grow operation; infrastructure such as fencing, security cameras, and water hookups that Sungrown was to provide.

Further, genuine issues of materteral fact exist as to what Sungrown was to provide and what the intentions of the parties were. Sungrown was familiar with the cannabis industry and had advertised the leased premises as being I-502 land/I-502 space. I-502 businesses (businesses in the cannabis/marijuana industry) need to meet rigorous regulatory requirements for their grow operations. Although the Lease may not have explicitly stated what needed to be provided, WLCB regulations have specific requirements grow operations need to meet in order for a site to be approved. Some such requirements would have been the obligations of Sungrown Farms even if not explicitly stated in the Lease. Further, by

representing the space and land was specific to I-502 business, Sungrown was representing it would provide certain amenities and that amenities provided would be adequate for a cannabis grow operation.

Tokeland's claims regarding quiet enjoyment are not confined to utility claims. Tokeland's claims included allegations regarding the behavior and conduct of Sungrown Farms' employees, agents, and owners. These claims were never addressed by Sungrown. Thus, genuine issues still exist as to how the actions of Sungrown Farms disrupted Tokeland's business and how it disrupted Tokeland's ability to enjoy the leased premises. Issues remain regarding the disruption to Tokeland's business when the power was turned off. Specifically, whether Tokeland was properly notified is one factual issue that remains to be resolved.

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B. Substantial justice is not done by refusing to allow Tokeland to present its case in court; an opportunity that was previously missed by Gates Law through no fault of Tokeland.

Summary judgment may be reconsidered, if, "substantial justice has not been done." CR 59(a)(9).

Here, substantial justice has not been done because Tokeland has not had its proper day in court. Evidence was not presented due to failures of Tokeland's previous counsel, and Tokeland should not be punished due to such failings. Gates Law failed to be a zealous advocate and failed in every way to perform the duties it owed to its clients. To prove this point, Sungrown continuously states in its brief that Tokeland did not present or produce evidence and based its allegations on conclusory statements.

The judgment in this case was effectively a default based on Gates Law's failures. Default judgments are disfavored and

may be vacated based on four factors. *See, White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The four factors are:

(1) That there is substantial evidence extant to support, at least *prima facie*, a defense to the claim asserted by the opposing party;

(2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect;

(3) that the moving party acted with due diligence after notice of entry of the default judgment; and

(4) that no substantial hardship will result to the opposing party.

Id.

In this case, there is substantial evidence to support a defense as outlined in Ms. Larson's Declaration filed on reconsideration; and there is more evidence that is not in the record. Tokeland's failure to present their case sooner was occasioned by surprise—*i.e.*, they were surprised Gates Law

had completely failed them. Tokeland moved with diligence, as soon as Gates Law's dereliction to duty was discovered, to retain new counsel and attempt to get the case in a posture where it could be litigated on the merits. And Sungrown will not suffer hardship because it will still have the opportunity to present its case on the merits.

Maybe there is justice for Tokeland in a malpractice action against Gates Law, but that is looking beyond the confines of the current matter. Focusing strictly on the present matter, it cannot be said that justice has been done because Tokeland has effectively been deprived of its day in Court. This case should be heard on the merits and not decided on an incomplete record because the case was bungled by Gates Law through no fault of Tokeland.

II. CONCLUSION

There are issues of material fact that should be decided by a jury. The case should be remanded for trial. Upon remand, Tokeland should be given the opportunity to conduct

discovery and present its case. Substantial justice is not done until this happens. The prior award to Sungrown must be reversed at this time, including the award of attorneys' fees. The prevailing party in this matter is entitled to fees, but it is premature to award fees—just as it was premature, and improper for the Trial Court to decide this case on summary judgment.

I hereby certify that the number of words contained in the foregoing document is 2,099 and conforms to the length limitations pursuant to RAP 18.17(c).

RESPECTFULLY SUBMITTED this 27th day of July, 2022.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of July, 2022, at Olympia, Washington.

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